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Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TWA325
Washington, D.C. 20554

**Re: Opposition to Petitions for Reconsideration and/or Clarification
CS Docket No. 98-201**

Dear Ms. Salas:

Transmitted herewith on behalf of the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the Fox Television Affiliates Association (collectively, the "Affiliate Associations") are an original and eleven (11) copies of an Opposition to the Petition for Reconsideration and/or Clarification filed by EchoStar Communications Corporation on March 15, 1999, and the Petition for Reconsideration filed by DirecTV, Inc. on March 15, 1999 in the above-referenced docket.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Sincerely,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Satellite Delivery of Network Signals to)	CS Docket No. 98-201
Unserved Households for Purposes of the)	RM No. 9335
Satellite Home Viewer Act)	RM No. 9345
)	
Part 73 Definition and Measurement of)	
Signals of Grade B Intensity)	

To: The Commission

**OPPOSITION TO PETITIONS FOR
RECONSIDERATION AND/OR CLARIFICATION**

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the Fox Television Affiliates Association (collectively, the "Affiliate Associations"), by their attorneys, respectfully oppose the Petition for Reconsideration and/or Clarification filed by EchoStar Communications Corporation ("EchoStar") on March 15, 1999, and the Petition for Reconsideration filed by DirecTV, Inc. on March 15, 1999.

**I. EchoStar's Petition Merely Parrots Its Original "Wish-List"—A List Of
Proposals The Commission Has Fully Considered And Rejected**

The arguments advanced by EchoStar in support of its request for reconsideration of four specific issues are unpersuasive and without merit. EchoStar merely repeats the arguments earlier considered and rejected by the Commission.

First, the Commission properly concluded that there was no basis for changing the Grade B signal intensity values, either generally or specifically for purposes of the Satellite Home Viewer Act

(“Act” or “SHVA”).¹ In addition, the Affiliate Associations documented extensively why the Grade B values should remain unchanged, or, if changed, revised *downward*.²

Second, the Commission, wisely, did not address multipath interference (“ghosting”) in its *Order*. Interference and other forms of possible signal impairment are not a matter of signal intensity.³ The Act refers only to “an over-the-air *signal of Grade B intensity*.”⁴ The Commission has no authority to ignore the language in or to rewrite any congressional act, let alone a copyright statute.⁵ Moreover, EchoStar readily concedes that ghosting is “a problem unrelated to signal strength” that cannot be “compensate[d]” “by adjusting signal strength levels.”⁶ There is no way ghosting can be evaluated other than by use of a “subjective” picture quality test—a test which, by its very nature, would render the Act unenforceable. As the Copyright Office concluded:

[A] picture quality test for eligibility of satellite service is far too subjective and inherently biased Furthermore, the Office does not believe that picture quality is a legally sufficient standard on which to base a determination of copyright liability.⁷

¹ See *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, Report and Order, FCC 99-14 (released Feb. 2, 1999) (hereinafter “*Order*”), at ¶ 42.

² See Joint Comments of the Affiliate Associations at 42-47; Joint Reply Comments of the Affiliate Associations at 6-24. The Affiliate Associations hereby incorporate by reference their previous comments on this issue.

³ See Joint Comments of the Affiliate Associations at 61; Joint Reply Comments of the Affiliate Associations at 39-40; Supplemental Information of the Affiliate Associations at 5-7. The Affiliate Associations hereby incorporate by reference their previous comments on this matter.

⁴ 17 U.S.C. § 119(d)(10) (emphasis added).

⁵ See, e.g., *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995).

⁶ EchoStar Petition for Reconsideration at 7.

⁷ U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering* (continued...)

The Office added further that “adoption of a picture quality standard would be unsound copyright policy.”⁸ Finally, as the Affiliate Associations visually demonstrated with submission of a videotape, even locations that are predicted to receive interference can and do receive a very acceptable and viewable picture with no impairment from interference, let alone from objectionable interference.⁹ Congress, therefore, properly prescribed an “objective” signal strength test for purposes of determining whether a household is “unserved.”

Third, the Commission gave full and detailed attention to the creation of a new measurement methodology for individual household locations.¹⁰ There is no need for the Commission to revisit any aspect of its *Order* in this regard. EchoStar’s previously rejected suggestion that signal intensity be measured at the television set and with the antenna pointed the wrong way warrants no further review.¹¹ By EchoStar’s own estimate, *complete* compliance with the Commission’s new testing methodology, which could entail, at a *maximum*, 20 separate measurements (five each for the four

⁷(...continued)
Retransmissions of Broadcast Signals (Aug. 1, 1997), at 126-27.

⁸ *Id.* at 127.

⁹ See Joint Reply Comments of the Affiliate Associations, Appendix D; Supplemental Information of the Affiliate Associations at 5-7.

¹⁰ See *Order* at ¶¶ 45-60.

¹¹ See, e.g., EchoStar Petition for Reconsideration at 11-12. In addition, the Commission also should not consider EchoStar’s request, *see id.* at 14, that a fixed-length dipole be permitted to be used with the results adjusted through the use of a calibration curve rather than the Commission-specified “standard half-wave dipole tuned to the visual carrier frequency of the channel being measured.” 47 C.F.R. § 73.686(d)(1)(i). EchoStar’s suggestion would add needless complexity and potential unreliability to what the Commission designed as a simple and readily replicable procedure. See NAB Opposition, Engineering Statement of Jules Cohen.

networks), would take less than an hour (55 minutes) and cost approximately \$100 per household.¹² EchoStar's "simplifications" would vitiate the accuracy and reliability of the test with virtually no benefit in cost savings. EchoStar, obviously, is not interested in "simplifying" anything. EchoStar's real interest appears to be in continuing to violate the law and infringe the copyrights and copyright licenses held by the broadcast networks and their copyright licensees. Moreover, EchoStar's new complaint—that the estimated \$100 testing cost is too expensive to be broadly used—is also without merit. The Commission's efforts in developing the new testing methodology have reduced the estimated cost of signal measurements by *one-third*.¹³ In addition, a principal purpose of the Commission in prescribing a new, more accurate site specific "predictive" signal model (i.e., Individual Location Longley-Rice ("ILLR")) was that the necessity for extensive site testing would be greatly reduced.

Finally, notwithstanding EchoStar's contention, the Commission correctly prescribed a 50% confidence factor for the ILLR. It is increasingly apparent that EchoStar simply does not understand the role of the confidence factor in the Longley-Rice model. Its failure to grasp the meaning of this technical concept is hardly a basis for Commission reconsideration. The Affiliate Associations have provided extensive documentation on the confidence factor.¹⁴ It is, also, noteworthy that EchoStar (and the Satellite Broadcasting Communications Association ("SBCA")) previously endorsed

¹² See EchoStar Petition for Reconsideration at 10 & n.30.

¹³ Compare *id.* (estimating cost under new methodology at approximately \$100) with *EchoStar Communications Corporation v. CBS Broadcasting, Inc.*, Plaintiffs' Original Complaint and Request for Declaratory Judgment, Civil Action No. 98-B-2285 (D. Colo. filed Oct. 19, 1998), at ¶ 60 (estimating cost under previous methodology at approximately \$150 per household).

¹⁴ See Joint Reply Comments of the Affiliate Associations at 45-48; Supplemental Information of the Affiliate Associations at 12-15.

TIREM,¹⁵ which sets the confidence factor at 50%. As SBCA's engineers acknowledged: "Within TIREM the percent confidence is set at 50%, indicating that median situations are always predicted—the user has no control over this statistical variable."¹⁶ Having embraced TIREM, EchoStar is estopped from arguing that the confidence factor should be set at anything other than 50%.

II. Longley-Rice Is Already An Empirically-Based Model And It Would Be Inappropriate To Double-Count Land Use And Land Clutter Data

DirecTV seeks reconsideration of the Commission's decision not to incorporate building and vegetation data into the ILLR at this time.¹⁷ DirecTV would have the Commission allow the satellite industry, on its own and with no Commission oversight or standards, to integrate the U.S. Geological Survey's Global Land Information System ("GLIS") database on land use and land clutter into the ILLR.¹⁸ Such a result could lead to chaos. No party should be permitted, unilaterally, to establish its own standards for compliance.

DirecTV has misread the Commission's statements that land use and land clutter data "should be used in the ILLR when an appropriate application develops" and that the Commission is "not aware of a standard means of including such information in the ILLR that has been accepted by the technical and scientific community."¹⁹ The problem is not, as DirecTV suggests, the

¹⁵ See EchoStar Comments at iii, 8-10.

¹⁶ SBCA Reply Comments, Hatfield & Dawson "Reply" Statement, at 8-9.

¹⁷ See Order at ¶ 83.

¹⁸ See DirecTV Petition for Reconsideration at 5.

¹⁹ See Order at ¶ 83.

mechanical task of integrating the U.S. Geological Survey's GLIS database into Longley-Rice. Instead, the reason why the GLIS data cannot be used in an off-the-shelf manner, no matter how accurate or accepted scientifically, is because Longley-Rice is an empirically-based model that, to some extent, already incorporates such data. To merely overlay the GLIS data on top of Longley-Rice, without backing out the empirical data upon which Longley-Rice is based, will result in "double-counting," and the reliability of the model's predictions of field strength will be greatly compromised.²⁰ It is this "appropriate application" or "standard means" that is currently lacking and why the ILLR cannot include building and vegetation data at this point in time.

Moreover, the Commission expressly "challenge[d] interested parties to develop such an application that more accurately reflects the signal intensity at an individual location."²¹ DirecTV has merely pointed out a database, the existence of which the Commission was already aware. DirecTV has not met this challenge and has not developed an application that "backs out" the

²⁰ The Affiliate Associations fully presented this inherent difficulty to the Commission in the original rulemaking proceeding. See Joint Reply Comments of the Affiliate Associations at 29; *id.*, Further Engineering Statement, at 6-7; Supplemental Information of the Affiliate Associations at 1-5.

To the extent the Commission finds it helpful in resolving this matter, the Affiliate Associations wish to clarify one point on this issue appearing in the *Order*. In the *Order*, the Commission states that the "Affiliate Associations acknowledge, however, that the empirical data allegedly incorporated in the Longley-Rice model consists of, at most, 'sparse' ground cover and some 'areas with moderate forestation.'" *Order* at ¶ 82. The terms "sparse" and "moderate forestation" were quoted directly from the Longley-Rice Manual itself and refer not to the amount of ground cover *in toto* but instead refer specifically to the amount of ground cover near the transmitting and receive locations. See G.A. Hufford *et al.*, *A Guide to the Use of the ITS Irregular Terrain Model in the Area Prediction Mode*, NTIA Report 82-100 (U.S. Dep't of Commerce Apr. 1982) ["Longley-Rice Manual"], at 12; see also *id.* at 22. Neither the Longley-Rice Manual, nor the Affiliate Associations for that matter, characterize the extent of ground cover between the two locations. Nonetheless, it is obvious that a straight path had not been cleared between the two locations, and whatever ground cover existed at that time is necessarily part of the model. This is what the Longley-Rice Manual means when it states that "[t]he model, therefore, includes effects of foliage, but only to the fixed degree that they were present in the data used." *Id.* at 12.

²¹ *Order* at ¶ 83.

empirical foundations of the Longley-Rice model and then incorporates in their place the GLIS data. DirecTV has not even provided for Commission or public scrutiny a version of the ILLR with a GLIS data overlay.

Furthermore, the Affiliate Associations question the accuracy and usefulness, for SHVA purposes, of a database that merely assigns one of thirty-seven composite theme grid files to each 200 meter square grid cell.²² Such a composite approach obviously makes no attempt to account for the actual buildings and vegetation that exist over the path from the transmitter to the individual household. Within a 200 meter square grid cell, one house could be located in an open field and another house surrounded by trees, or one house could be shielded by a multistory building from a broadcaster's tower, and another house, as many as three football fields away, could have a clear line of sight to the tower. A composite approach, such as DirecTV proposes, simply cannot satisfy the requirements of such a sensitive application as the SHVA. That approach would introduce more errors and difficulties than the ILLR the Commission has specified. Moreover, the ILLR that the Commission specified considers terrain elevation every 1/10 of a kilometer (100 meters).²³ The incongruity between the terrain elevation data and the buildings/vegetation data adds another layer of potential inaccuracy that it is simply not necessary to countenance.

Finally, for the obvious reasons stated above, the Affiliate Associations object strenuously to DirecTV's suggestion that DirecTV and the other members of the satellite industry should be permitted to substitute their own proprietary, GLIS-enhanced ILLR in place of the Commission-sanctioned and publicly-scrutinized model that the Commission adopted in this rulemaking.

²² See DirecTV Petition for Reconsideration, Plummer Declaration, at ¶ 5.

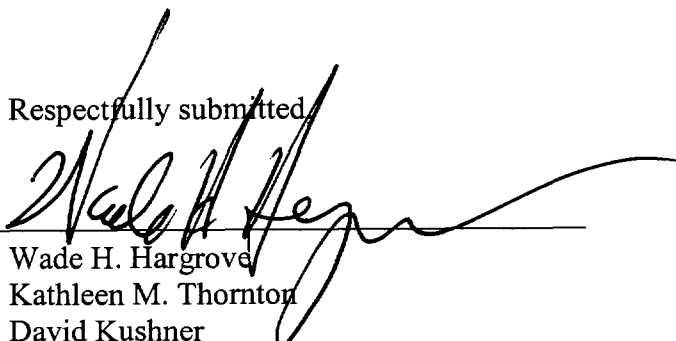
²³ See *Order* at ¶ 80.

Conclusion

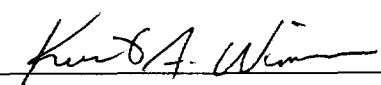
For the foregoing reasons, the Affiliate Associations respectfully submit that there is no basis for the Commission to act further in this proceeding. Accordingly, EchoStar's and DirecTV's Petitions should be dismissed.

Respectfully submitted,

By


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April 16, 1999

Certificate of Service


The undersigned, of the law firm Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he served a copy of the foregoing **Opposition to Petitions for Reconsideration and/or Clarification** by U.S. mail, first class postage prepaid, addressed as follows:

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This the 16th day of April, 1999.

A handwritten signature in cursive script, reading "Jennifer P. Curley", written over a horizontal line.